Supreme Court of the United States

OCTOBER TERM, 1942.

No. _____.

EMMA A. OUERBACKER, - - - - *Petitioner,*

v.

HENDERSON COUNTY, N. C., BANKRUPT, - *Respondent.*

MEMORANDUM BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The errors pointed out in the petition for certiorari were all called to the attention of the District Court and the Circuit Court of Appeals. The objections of the petitioner were disregarded by both courts for the sole reason that petitioner was in a small minority and both courts appeared to feel that the wishes of the majority of the creditors must control in spite of obvious errors in the proceedings.

The Circuit Court of Appeals in the first paragraph of its opinion stressed the fact that petitioner "owned less than 1% of the indebtedness affected by the plan." In the last paragraph of its opinion, the Court stated that the wishes of the majority creditors were not to be defeated without good cause "by a recalcitrant minority, no matter how persistent."

Petitioner concedes that 98% of the bondholders had exchanged under the 1936 voluntary refunding plan and that more than 66⅔% of the bonds had been deposited for exchange under the 1940 voluntary refunding plan when this petition was filed. However, cases under the Municipal Bankruptcy Act will never be initiated unless the proposed plan of composition is approved in advance by a substantial majority of the creditors. If there is objection to any plan or to any proceeding, it must always come from a small unorganized minority.

The petition thus presents a preliminary question of importance, namely, whether serious and substantial errors in such proceedings cease to become grounds for objection merely because the minority interests are relatively small in number; or to put the question another way, do the mandatory provisions of the Municipal Bankruptcy Act depend for their effectiveness upon the number of non-consenting creditors?

Petitioner may frankly admit that her actual pecuniary interests in this case are relatively small compared to the interests of the creditors who have accepted the plan. In fact, the actual amount of money involved might perhaps be too small to justify presenting these problems to this Court in an ordinary case. This case, however, is not an ordinary case. A great number of cases all over the country are continually arising under the Municipal Bankruptcy Act. If the decision of the Circuit Court of Appeals in this case is allowed to stand unchallenged and uncorrected by

this Court, it will stand as authority for the approval of similar errors in other cases and may well result in a complete distortion of the purposes of the Act.

As this Court so clearly pointed out in the case of *American United Mutual Life Insurance Co.* v. *Avon Park,* 311 U. S. 138, 85 L. Ed. 91, Congress did not intend the Municipal Bankruptcy proceedings to be controlled exclusively by any numerical percentage of creditors, nor did Congress intend that the interests of the minority, no matter how small, should be under the absolute control of the majority. "The Court is not merely a ministerial register of the vote of the several classes of security holders." *Case* v. *Los Angeles Lumber Products Co.,* 308 U. S. 106, 114, 84 L. Ed. 110, 119. The bankruptcy court was to be the fair and impartial arbiter exercising at all times an "informed, independent judgment." Both the District Court and the Circuit Court of Appeals failed to perform this function in this case and approved of erroneous proceedings merely because it was represented that the majority of creditors were anxious to rush the plan through to a conclusion.

Nor are opinions of local agencies such as the Local Government Commission, nor of bondholders' committees such as the North Carolina Municipal Council, Inc., entitled to any compelling weight in cases of this character. Local agencies, by common knowledge, have a natural tendency to favor what appears to be the interest of local taxpayers and local communities. Bondholders' committees usually composed, as here,

largely of investment dealers and brokers representing, among others, banks and fraternal orders (Record, p. 59), have by common knowledge a natural tendency to approve any proceeding which will keep securities current and avoid the necessity of carrying securities in default. The bankruptcy court alone is in a position to survey the whole situation with an unprejudiced eye, to weigh conflicting claims and interests and to reach a final decision as to whether any proposed plan is

> "fair, equitable and for the best interests of the creditors and does not discriminate unfairly against any creditor or any class of creditors."

The District Court in this case succumbed to the compelling weight of numbers and to what appeared to be the superior judgment of the local Commission and the bondholders Committee. The Court did not investigate the written consents; it did not even wait for a hearing before actually putting the plan into effect; it made no independent investigation of the financial position of the County; it disregarded a judgment itself had entered; it passed upon and approved two plans in one proceeding; it failed to bring all creditors of the same class within the plan; and it misconceived the activities of the fiscal agent. At no time during the proceedings did the District Court insist on the minimum requirement of "full disclosure" as to any aspects of the plan. In short, it did nothing but act as

a register of the majority vote in direct violation of the principles heretofore announced by this Court.

The actions of the District Court and the approval thereof by the Circuit Court of Appeals evidence such a complete and utter disregard of the clear meaning and intent of the Municipal Bankruptcy Act as to justify a review of this case by this Court. It is submitted that a Writ of Certiorari should be granted.

Respectfully submitted,

HENRY E. MCELWAIN, JR.,
Kentucky Home Life Bldg.,
Louisville, Ky.,

W. P. SANDRIDGE,
Wachovia Bank & Trust Co. Bldg.,
Winston-Salem, N. C.,

RICHARD M. MAXWELL,
Atlanta, Georgia,

Counsel for Petitioner.